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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 46.

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

In replying to appellee's brief, we shall refer to our opening brief by the letter B and to appellee's brief by the letters AB. In the argument on the merits for brevity we shall sometimes refer to Clause 3, Section 8, Article I, of the Constitution as the commerce clause; to Clause 2, Section 10, Article I, either as the export clause or the import-export clause; to Clause 5, Section 9, Article I, as the federal export clause. As all of the applicable provisions of the Constitution are in Article I, when we refer to them by clause and section we shall omit the article.

Also, as in our opening brief, we shall refer to the New Zealand Stores Control Board as the Control Board, and to the acts of appellant's trustee predecessor in interest as the act of appellant.

All emphasis throughout this brief will be ours, unless it is indicated that italics are those of the text.

JURISDICTION.

Appellee Advances Neither Reason Nor Authority to Sustain the Point That the Judgment of the Court Below Is Not Final Within Both the Letter and the Spirit of Section 237a of the Judicial Code.

Appellee does not claim that any element of jurisdiction of this appeal is lacking other than that the judgment of the court below is not final. Appellee states that it presented the point because it felt it was its duty to do so, and frankly concedes that a dismissal of this case on that ground would not terminate this litigation. Indeed, reading between the lines, it is apparent that appellee feels, as we do, that the public interests demand as early a determination as possible of the nationally important constitutional question. That, of course, would not justify this court in entertaining the appeal if the judgment of the court below was not final within the meaning of Section 237a.

We are satisfied that it is final both within the letter and the spirit of that provision.

If this court were to dismiss the appeal on the ground the judgment was not final, it would mean that the parties would have to return to the Superior Court, which appellee concedes—as indeed it must—would have no discretion other than to enter judgment for the defendant.

Appellee asserts, however, on page 4 of its brief that in entering such judgment, the Superior Court would be acting judicially. In this, we believe, appellee is in error. Judicial action presupposes the exercise of discretion.

In the instant case, if the parties are compelled to return to the Superior Court, in order ultimately to present to this court the constitutional question involved, appellant would have to appeal to the Supreme Court of the State of California from the judgment that the Superior Court would be compelled to enter against appellant. Appellee does not challenge the proposition stated in our opening brief and sustained by the authorities there cited (B. 8-9) that the State Supreme Court would be bound by the decision appealed from, and by it just as much precluded from again considering the federal constitutional question involved in the litigation or reversing the judgment of the Superior Court entered in conformity with the decision appealed from, as it would be had the decision appealed from contained a specific direction to enter judgment for defendant.

In our opening brief, page 11, we cited the early cases of *Mower v. Fletcher*, 114 U. S. 127, 128. There judgment in favor of the defendants had been reversed with directions to enter judgment for the plaintiffs as prayed for in the complaint, and this court denied a motion to dismiss the writ of error, stating that the judgment of the state court was final and had determined the litigation between the parties. Ever since that decision the judgment of a state court reversing a judgment with directions to enter judgment for the appellee, has been held by this court to be a final judgment within the meaning of Section 237a. Yet, under the law of California, the party

against whom a judgment is entered by direction *has the same right of appeal as from a judgment entered against him after reversal without direction.* The Appellate Court is equally bound, in either appeal, by its prior decision. See:

Randall v. Duff, 107 Cal. 33, 36, 40 Pac. 20, 21;

Tupman v. Haberkern, 208 Cal. 256, 269, 280 Pac. 970, 976;

Klauber v. San Diego Street Car Company, 98 Cal. 105, 107, 32 Pac. 876.

In the first case cited, in answer to a motion to dismiss an appeal from a judgment entered on direction of the Supreme Court, it is said:

> "And such a judgment is as plainly within the language allowing appeals as any other. I think there can be no doubt of the right to appeal."
>
> *Randall v. Duff*, 107 Cal. 33, 36, 40 Pac. 20, 21.

The reason that ordinarily a reversal without directions is not final within the meaning of Section 237a is that the parties have a right to amend their pleadings and introduce new and different issues, and no matter how practically impossible that may appear, usually it cannot be said to be judicially impossible. They may also be able to offer different evidence. In the instant case, appellee does not—and obviously cannot—challenge our contentions as to the effect of the Sales Tax Act of California. In fact, it prints as an appendix the same

sections which we set out, which clearly requires a claim for refund to be presented within ninety days after payment of the tax and prohibits an action being brought *upon any other grounds than those stated in the claim.*

The only case cited by us in support of the finality of this judgment which appellee comments on is *Clark v. Williard, 292* U. S. 112.

On pages 16 and 17 of our opening brief we quoted from two carefully prepared law review articles, each interpreting the decision of this court in *Clark v. Williard,* as giving finality to the type of judgment here appealed from. Neither of these articles nor their reasoning are noted or replied to by appellee. On page 13 of its brief, however, it says:

> "In *Clark v. Williard, 292* U. S. 112, the judgment was reversed 'for further proceedings in accordance with the opinion.' The judgment of the California Supreme Court contained no such direction."

But under the numerous cases cited in our opening brief, it is apparent that the reversal contained the implied direction to the court below to proceed in conformity with that opinion.

Appellee does not challenge the rule stated in *Estate of Baird,* 193 Cal. 225, 258, 223 Pac. 974, 987, quoted in our brief, pages 14 and 15, that it is no part of the function of a trial court to decide whether the appellate court correctly decided the question, its sole duty being to fol-

low without question the principle established by the decision of the appellate court.

The decision of our Supreme Court in *Davidson v. Dallas,* 15 Cal. 75, seems to us conclusive on this point. It is true that it is an early case, but it has never been criticized, and it not only clearly states the law which has ever since prevailed in this state, but illustrates the limitation upon the rule that on a reversal without direction the case is at large.

In the *Davidson* case, judgment was rendered for the plaintiff and on appeal reversed, the opinion of the Supreme Court concluding:

> "The judgment of the Court below should be reversed, a new trial ordered, and the cause remanded for further proceedings."
>
> *Davidson v. Dallas,* 8 Cal. 227, 257.

On the retrial, the evidence being the same, the court entered judgment for the defendants. Plaintiff appealed. In affirming the judgment, the court reached the conclusion that its former decision was not correct, but that it was binding and conclusive upon the court, saying in part:

> "In the case of affirmance, there is no question of the finality of the judgment. Why in the case of reversal? It is true the case is remanded—but how? to be retried *in pursuance of the principles of law declared in the opinion.* The directions of the opinion become a portion of the judgment. The

opinion in this case remands the case for further proceedings, *and those proceedings are to be in pursuance of the principles of the opinion. This is, in effect, if not directly, a mandate to the Court below to follow the directions of the opinion of this Court, on new trial; to administer the law as laid down in the opinion."*

Davidson v. Dallas, 15 Cal. 75, 84.

Actually, the decisions cited in our opening brief at pages 8-9 are to the same effect.

In the instant case as we pointed out in our opening brief—and appellee does not challenge it—there would be nothing to retry in the Superior Court. The Sales Tax Act would prevent the appellant from amending its complaint to present any other or different grounds of recovery than those set out in its claim for refund. The Supreme Court of this state has finally and conclusively held that the facts stated in the claim for refund and realleged in the complaint plus the supplemental and explanatory facts stipulated to by the parties did not constitute an export sale within the meaning of any of the applicable clauses of the Constitution. This decision vitally affects the commerce of the nation, that of the inland states as well as of the seaboard states, and is final so far as the courts of California are concerned. We submit that both in principle and authority this court has jurisdiction to review that decision and determine the constitutional question which it presents.

INTRODUCTORY STATEMENT TO APPELLANT'S REPLY TO APPELLEE'S ARGUMENT ON THE MERITS.

Clause 2 of Section 10 in the most clear and explicit language prohibits any state without the consent of Congress from levying any tax or impost upon imports or exports. The clause by the clear language of the Constitution is an additional limitation upon the states not contained in the Commerce Clause, and was *precisely so intended by the framers of the Constitution.*

We believe, therefore, that the sole ultimate question in the case is whether or not the transaction was an exportation of the oil.

Appellee does not challenge our statement of the facts. It admits that pursuant to request for bids by the Control Board (appellant's bid being accepted) the oil was exported to New Zealand pursuant to a contract entered into between appellant and the Control Board for delivery of oil to the New Zealand Navy, the oil to be priced f. o. b. vessel-rail and delivered to the New Zealand government tanker "Nucula," consigned to the Officer in Charge at New Zealand. By the contract the captain of the "Nucula" was to keep the appellant advised of his approach [R. 23] He did so, and as the vessel neared the Marine Terminal, appellant started pumping oil from its tank farm at Watson to storage tanks at the Marine Terminal. As soon as the vessel docked and was ready to receive it, the oil was pumped aboard the "Nucula" from the storage tanks [R. 32]. That the transaction from start to finish contemplated and constituted an exportation of the oil seems to us undeniable.

The court below, however, held:

(1) That the exportation of the oil did not commence until the "Nucula" cleared for its return to New Zealand.

(2) That the power of the state to tax exports is coextensive with the power to tax interstate transactions, and since the Constitution did not forbid non-discriminatory taxes upon interstate commerce that do not interfere with congressional control thereof, the Constitution does not prohibit like state taxes upon exports.

(3) That the tax could be sustained as an excise tax for the privilege of conducting business in the State of California.

In our opening brief we discussed separately each of the three grounds on which the court below based its decision and believe we demonstrated that each was erroneous.

Appellee's brief does not challenge the accuracy of our analysis of the decision below, or suggest that it was not based on the grounds enumerated. Nor does appellee attempt *seriatim* to answer the points which we have made.

As to our first point, we can find no direct answer. There is no challenge to the argument that if the export clause were construed as prohibiting a tax only upon goods after being loaded into a vessel and after the vessel had cleared port, the constitutional provision practically would have been meaningless, and would not terminate any of the abuses which it was the intention of the framers of the Constitution to end.

None of the cases cited by appellee in support of its contention that the sale was a local one deal with export sales. *Superior Oil Co. v. Mississippi*, 280 U. S. 390 (the case upon which appellee places its greatest reliance), is factually entirely dissimilar from the instant case and was factually distinguished from the *Spalding* case. This Court held in the *Superior Oil Co.* case that the transportation of the gasoline out of the state was purely accidental and that there was nothing in any way which committed the purchaser to send the oil out of the state. In the instant case, the transportation of the oil to New Zealand was not accidental and the "Nucula" was legally compelled by the contract, the export declaration and the bill of lading consigning the oil to the Naval Officer in Charge at Auckland to transport the oil out of the state.

As we read appellee's brief it places its greatest reliance upon its argument that the Commerce Clause and the Import-Export Clause are synonymous. Hence we shall reply to that point first.

APPELLANT'S REPLY TO APPELLEE'S ARGUMENTS ON THE MERITS.

I.

Appellee's Argument That the Commerce and Export Clauses Are Synonymous, and the Export Clause Permits the Levying by the States of Nondiscriminatory Taxes Upon Exports, Is Contrary to the Plain Language of the Constitution and the Intent of Its Framers, as Evidenced by the Constitutional History of the Clause.

The conclusion of the majority of the court below that the states have the same power of taxing exports as they have of interstate commerce ignores the export clause *and interprets the Constitution as if the commerce clause were its only applicable provision.*

Appellee, without analyzing the two clauses, argues that they are identical in meaning and in their limitation upon the states. If this argument were sound, it would mean *that the import-export clause was useless surplusage.*

Appellee asserts (A. B. 17) that its contention that the commerce clause and the import-export clause are synonymous finds support in the constitutional debates and the history of the interpretation of the import-export clause.

In reply to appellee's argument, we will examine first, the language of the two clauses, and second, their constitutional history.

Before doing so, it is not inappropriate to point out that the appellee's entire argument is inconsistent with its enforcement of the Sales Tax Act. On page 10 of its brief, appellee states that the board has not attempted to tax sales where delivery was made to a common carrier.

In its Appendix B, appellee prints its Rule No. 26, which reads:

> "The California retail sales tax *does not apply* to gross receipts from sales made in *interstate or foreign commerce.*"

If, as appellee now contends, the Constitution of the United States does not prohibit any non-discriminatory tax on exports and the tax herein involved is non-discriminatory, then the Sales Tax Act applies and export sales no matter how consummated are subject to the Act, and appellee board has for years failed to enforce the statute.

(1) THE COMMERCE CLAUSE AND THE EXPORT-IMPORT CLAUSE ARE NOT SYNONYMOUS AND THE EXPORT-IMPORT CLAUSE WAS INTENDED TO PLACE UPON THE STATES TAX RESTRICTIONS NOT EMBRACED IN THE COMMERCE CLAUSE.

As noted, it is to be observed that if appellee's contention is correct, it would mean that the whole of the export clause is surplusage. This court has repeatedly held that no single word or sentence of the Constitution is to be so regarded.

In the very early case of *Holmes v. Jennison*, 14 Pet. 540, 570-1, Chief Justice Taney said:

> "In expounding the constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, *that no word was unnecessarily used, or needlessly added.* The many discussions which have taken place upon the construction of the constitution have proved the correctness of this proposition; and shown the high talent, the caution,

and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. *No word in the instrument, therefore, can be rejected as superfluous or unmeaning.* . . ."

Holmes v. Jennison, 14 Pet. 540, 570-1.

The above observations have been consistently followed by this court. See:

Williams v. United States, 289 U. S. 553, 572;
Wright v. United States, 302 U. S. 583, 588;
Ogden v. Sanders, 12 Wheat. 213, 316;
Prout v. Starr, 188 U. S. 537, 543;
Marbury v. Madison, 1 Cranch 137, 175;
Sturges v. Crowninshield, 4 Wheat. 122, 202.

Article I of the Constitution vests legislative power in the Congress of the United States. Section 8 enumerates the powers granted to Congress. The third clause reads:

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:".

If this were the only Constitutional provision upon the subject, appellee's arguments would be sound, since Clause 3 of Section 8 grants identical power to Congress to regulate commerce among the states as with foreign nations.

The clause does not contain any direct limitation on either the states or Congress to tax commerce with

foreign nations or among the states. Nor is there any other provision of the Constitution in any manner attempting to limit the power of the states to tax commerce between the states. Hence, this court has held, as shown by the authorities cited in the opinion of the court below and in our opening brief, that the states are free to tax interstate commerce, except that taxes may not be discriminatory or of such a nature as to interfere with congressional control thereof.

From these decisions appellee argues that the states undoubtedly have the same power to tax exports. This was the view of the court below. The argument entirely overlooks the export clause. Hence, appellee is forced to the obviously illogical contention that the import-export clause is synonymous with the commerce clause.

Clause 5 of Section 9 reads as follows:

> "5. No tax or duty shall be laid on articles exported from any State."

Clause 2 of Section 10 reads:

> "2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Thus we find the Constitution granting power to Congress to regulate commerce between the several states and with foreign nations, the clause granting that power containing no direct limitations upon the power of the federal

government or of the states to tax either commerce. We then find the Constitution by Clause 1, Section 8, granting to Congress specific power to levy imposts and duties on imports, but by Clause 5, Section 9, unqualifiedly and absolutely prohibiting a federal tax upon exports, and by Clause 2, Section 10, prohibiting the several states from levying *any* tax upon exports or imports without the consent of Congress, except such taxes as may be absolutely necessary for executing inspection laws.

Upon what possible basis then can it be said that the commerce clause and the import-export clause are identical or that a statute can not offend the import-export clause unless it also violates the commerce clause? The two do not even deal with the same subject.

In this connection, we desire to point out as emphatically as possible that the appellee has not answered or even commented on our argument (B 64) that the very fact of the exception in the Constitution permitting the levying of taxes absolutely necessary for the execution of inspection laws demonstrates beyond question that the framers of the Constitution did not intend *any other exception to the otherwise absolute prohibition of state taxation of imports and exports.*

Further, the prohibition of Clause 2, Section 10, is not against taxes on exports alone but against the levying of any tax upon imports as well. No one can contend that it was part of the scheme of the Constitution that the states should derive any income from imports. Yet if appellee's contention is correct, the several states have retained and today have the power of levying nondiscriminatory imposts upon imports. As shown in our

opening brief, this court squarely held in *Low v. Austin*, 13 Wall. 29, that a nondiscriminatory tax of the State of California on imports was in contravention of the import-export clause.

Appellee frankly admits (AB 33) that this court has twice held* nondiscriminatory state taxes upon imports to be a violation of the import-export clause, but argues that the point was overlooked by the court because not called to its attention by counsel. The fact in itself that such a construction of the Constitution *was not suggested by counsel or discussed by this court in those cases is almost conclusive that it is not permissible.*

Appellee sets forth and discusses many cases which are not at all applicable to any of the issues in the case at bar, and we believe quite seriously misinterprets many others.

On page 24 it intimates that the basis of the decision in *Coe v. Errol*, 116 U. S. 517, was that the tax was not a burden upon exportation. The statement is entirely erroneous. The case was one dealing with a tax claimed to be on interstate commerce and hence invalid. The appellant owned a mill in Maine and had, pursuant to a custom of many years, cut logs in Maine and, to get them to his mill, had floated them into New Hampshire where they were held by low water awaiting the spring freshets. He had also cut logs in New Hampshire and was holding also with high water to float them to the mill. The respondent Tax Collector assessed an ad valorem tax upon all of the logs. The proceeding was instituted in the Supreme Court of New Hampshire to abate the entire

*Hooven & Allison Co. v. Evatt, 324 U. S. 652; Low v. Austin, 13 Wall. 29.

tax. That state supreme court held the logs cut in Maine, although in New Hampshire, were in the course of an interstate journey and not subject to tax, but that the logs cut in New Hampshire, not having started on their journey, were subject to taxation. The state did not appeal from the portion of the decision against it, but Coe did, and the tax on the logs cut in New Hampshire was affirmed by this Court upon the ground that there had been no movement of them, and that the appellant could, or could not, send them out of the state, as he saw fit. In part, this Court said:

> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been shipped*, or entered with a common carrier for transportation to another State, or *have been started upon such transportation in a continuous route or journey*. We think that this must be the true rule on the subject. * * * Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. *And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State.*" (Pp. 527-528.)

While, as noted, the state did not appeal from the decision annulling the tax as to the logs cut in Maine, this Court, in referring to that portion of the decision, said:

> "Such goods are already in the course of commercial transportation, *and are clearly under the protection of the Constitution.* And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation."
>
> *Coe v. Errol,* 116 U. S. 517, 525, 527, 528.

As noted in our opening brief (B 48), this case has been consistently followed and the rules which it announced have never been criticized or modified. We submit the delivery to the "Nucula" clearly started the oil on its journey to New Zealand. In fact, we believe it was so started when the appellant commenced pumping it from its tank farm at Watson.

In attempting to argue that the *Superior Oil Company v. Mississippi,* 280 U. S. 390, and the *Spalding and Brothers v. Edwards,* 262 U. S. 66, cases demonstrate that the commerce clause and the import-export clause are identical, appellee quotes from Justice Hughes in *Minnesota v. Blasius,* 290 U. S. 1, to the effect that the Commerce Clause does not prevent state taxation of interstate commerce where the tax does not interfere with the Congressional regulation thereof. Just how that decision sustains appellee's contention we are unable to ascertain.

On page 30, referring to the *Spalding* case, appellee says:

> "Unquestionably the case would have been decided the same way if a State tax had been involved and the goods had gone to Florida instead of Venezuela."

The error of this statement is at once apparent when it is borne in mind that the tax there condemned was a Federal Excise Tax applicable to all sales within the United States whether intrastate or interstate. This court held that as applied to an export sale, it was repugnant to the Federal Export Clause.

Appellee on page 28 frankly concedes that in the *Spalding* case the Solicitor General argued, as appellee argues here, that the Federal Export Clause did not prohibit nondiscriminatory taxes. While such argument is not mentioned in the opinion, it is evident that this court rejected it. The same contention, however, was advanced in the earlier case of *Fairbank v. United States,* 181 U. S. 292, and rejected by this court, which said in part:

> "This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, *all exportation shall be free from national burden.*"

Fairbank v. United States, supra, 183 U. S. 281, 292.

From the language of the import-export clause it is equally evident that the framers of the Constitution intended that the states should likewise place no burden, nondiscriminatory or otherwise, upon exports.

See:

> Miller on the Constitution of the United States, pp. 591-2, cited with approval in *United States v. Hvoslef*, 237 U. S. 1, 13.

On page 63 of our opening brief we pointed out that in order to sustain the decision of the court below, Clause 2, Section 10, Article 1, must by interpretation be amended to read:

> "No State shall, without the Consent of Congress, lay any *discriminatory* Imposts or Duties on Imports or Exports * * *"

but that had the Constitution been so written, it would have permitted nondiscriminatory state taxation of imports as well; and also clearly the imposition of *discriminatory* taxation by the states for the execution of its inspection law. *Appellee does not notice this argument.*

(2) THE CONSTITUTIONAL DEBATES MAKE IT CLEAR BEYOND QUESTION THAT THE FRAMERS OF THE CONSTITUTION INTENDED TO PLACE A LIMITATION UPON THE TAXING POWERS OF THE STATES AS TO IMPORTS AND EXPORTS NOT APPLICABLE TO INTERSTATE COMMERCE.

We think appellee is in error in its statement (AB 18) that there was comparatively little discussion of the taxation of exports or imports. Appellee makes no reference whatever to the discussion in the several states of that

subject preceding the ratification of the Constitution and the only reference to the debates in the convention is that occurring on September 12, 1787.

For the convenience of the court, we have attached as Appendix "A" the entire portion of the debate on the subject on that date as reported by Mr. Madison, and as Appendix "B" the debate on the subject before the Virginia Convention between Mr. Mason and Mr. Madison.

However, appellee's own exposition and interpretation of the debates demonstrates that the framers of the Constitution did not intend to leave the states any right of taxation of either imports or exports, nondiscriminatory or otherwise.

Our interpretation of the debate referred to by appellee is that Mr. Madison's doubts were *not* to non-necessity of the import-export clause, but to the non-necessity of the exception contained therein with reference to the inspection laws.

Be that as it may, the sum and substance of the appellee's reference to these debates is that Messrs. Ellsworth, Madison and Fitzsimmons thought that the import-export clause was unnecessary and that the interests of all of the states, including the inland states, were safeguarded by the commerce clause. Appellee then naively says (AB 19):

> "It is apparent, however, that the inland States were not satisfied with these assurances *and demanded the express prohibition of such levies.*"

The above statement is obviously correct.

What, then, is the situation disclosed by appellee's own interpretation of the constitutional history? The Convention had apparently agreed upon the commerce clause. When it took up consideration of the import-export clause, certain of the members doubted its necessity, thinking the commerce clause was sufficient, but the inland states were not satisfied that the commerce clause contained any limitations upon the powers of the states to tax imports and exports and *demanded express prohibition of such levies.*

Had the framers of the Constitution intended that the states should have the same power to tax exports as to tax interstate commerce and no more or less, they would have either (a) omitted the export clause or limited it to imports; or (b) included in the clause, commerce between the states.

Clear as this appears both from the language of the Constitution and from its history as outlined by appellee, it is emphasized by the reference to the further debates thereon and the discussions of the clauses prior to ratification.

A study of the Journal of the convention will show that the question of prohibition of taxation of exports either by the federal government or the states was before the convention several times and at the outset there were very divergent views thereon. An examination of the debates will show that the principal controversy was as to the prohibition of taxation of such exports by the federal government, as apparently a majority but not all of the delegates from the start seemed in favor of prohibiting taxation of imports or exports by the states. In any event, the subject was before the convention on May 27,

1787 (pp. 192-3*); on July 12, 1787 (p. 302); on July 23, 1787 (p. 357); on August 6, 1787 (p. 379); on August 8, 1787 (p. 391), and on August 16, 1787 (p. 432 *et seq.*). The debate on this subject at this session was quite long. According to Madison's Journal:

> "MR. MADISON. First the power of laying taxes on exports is proper in itself; and, *as the states cannot with propriety exercise it separately*, it ought to be vested in them collectively.
>
> * * * * * * * *
>
> "MR. WILLIAMSON considered the clause proposed against taxes on exports, as reasonable and necessary."
>
> Madison's Journal, vol. 2, p. 539.

Mr. Langdon opposed the adoption of a federal export clause because it left the states free to tax exports; which *"could not be admitted"* (p. 572).

As pointed out in the decision of this court in *Fairbank v. United States, supra*, 181 U. S. 283, 292-3, Mr. Clymer moved that after the word "duty" in the federal export clause should be inserted the words "for the purpose of revenue," but the motion was defeated (p. 576).

The federal export clause was adopted on August 21, 1787 (p. 577).

On August 6, 1787, the import-export clause was presented to the convention and debate on it (to which we believe appellee referred) occurred on the 12th of August.

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*All page references are to Madison's Journal of the Constitutional Convention (Scott's Edition, 1894), Vols. 1 and 2.

Mr. Mason, one of the delegates to the convention from Virginia, wrote a pamphlet against its ratification addressed to the citizens of Virginia. In that pamphlet he said:

> "The state legislatures are restrained *from laying export duties on their own produce* * * *."
>
> The Federalist and Other Constitutional Papers (Scott's Edition, 1898), p. 883.

James Iredell wrote a pamphlet in which he considered each specific objection by Mr. Mason. In answer to Mason's objection to the export clause he said, in part:

> "IX OBJECTION. 'The State Legislatures are restrained from laying export duties *on their own* produce.'
>
> * * * * * * * *
>
> "Every duty laid upon exported produce operates in fact as a tax by the exporting State upon the non-exporting State * * * and to remove as much as possible every ground of discontent, Congress itself are prohibited from laying duties on exports, because by that means those States which have a great deal of produce to export would be taxed much more heavily than those which had little or none for exportation."
>
> The Federalist and Other Constitutional Papers (Scott's Edition, 1898), pp. 913-4.

Mr. Mason did not rest upon his pamphlet but as a delegate to the Virginia ratifying convention vigorously assailed the export clause, both because it limited and interfered with the right of Virginia to defray the expenses of inspection and unjustly deprived Virginia

of the income it had always enjoyed from taxation of exports. The clause was defended by Madison as entirely just when considered from the national viewpoint and that of the inland states.

Mr. Mason in attack upon the import-export clause said in part (italics are as in the text):

> "For forty years we have laid duties on tobacco, to defray the expenses of the inspection, and to raise an incidental revenue for the state. Under this clause, that incidental *revenue* which is calculated to pay for the inspection, and to defray contingent charges, is to be put into the federal treasury."
>
> Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, p. 481.

In *Cook v. Pennsylvania*, 97 U. S. 566, 574, it is stated that Rhode Island because of the revenues of which she would be deprived by Clause 2, Section 10, did not ratify the Constitution until three years after ratification by the other twelve states.

In our opening brief (B 64-65) we quoted from the decision of this court quoting Luther Martin, the attorney general of Maryland, as stating in argument of *M'Culloch v. Maryland* that the state governments surrendered *altogether* their right to tax imports and exports, giving to the government the authority to tax all other subjects, but reserving to the states the right to tax the same subjects to an unlimited extent. Luther Martin in his

letter to the convention which finally ratified the Constitution in speaking of the clause said:

> "By this same section, every state is also prohibited from laying any imposts, or duties, on imports or exports, without the permission of the general government. It was urged that, as almost all sources of taxation were given to Congress, it would be but reasonable to leave the states the power of *bringing revenue into their treasuries by laying a duty on exports*, if they should think proper, *which might be so light as not to injure or discourage industry, and yet might be productive of considerable revenue;* also, that there might be cases in which it would be proper, for the purpose of encouraging manufactures, to lay duties to prohibit the exportation of raw materials, and, even in addition to the duties laid by Congress on imports, for the sake of revenue, to lay a duty to discourage the importation of particular articles into a state, or to enable the manufacturer here to supply us on as good terms as they could be obtained from a foreign market. *However, the most we could obtain was, that this power might be exercised by the states with, and only with, the consent of Congress,* and subject to its control; and so anxious were they to seize on every shilling of our money for the general government, that they insisted *even the little revenue, that might thus arise, should not be appropriated to the use of the respective states where it was collected, but should be paid into the treasury of the United States; and accordingly it is so determined.*"
>
> Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 1, p. 377.

Alexander Hamilton in The Federalist, in urging the adoption of the Constitution, said:

> "* * * yet I am willing here to allow, in its full extent, the justness of the reasoning, which requires, that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession I affirm, that *(with the sole exception of duties on imports and exports)* they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense * * *"

> The Federalist, (Hollowell Ed., 1842), number XXXII, pp. 139-40.

It would thus appear certain that the men who drafted the Constitution knew that they were prohibiting entirely the levying of any state taxes upon imports and exports, and they used clear words to express that intent.

On page 20 of its brief, appellee says:

> "It would seem that if the exponents of States rights in the Convention had thought that the export-import clause would be interpreted to preclude the levy of nondiscriminatory excises, they would have objected vehemently to the provision."

It is obvious from the history of the clauses set out, both by ourselves and appellee, that the representatives of some of the seaboard states did object most vehemently both in the convention and later to their respective states, *but that their objections did not prevail.*

The observations of this court in the early case of *Sturges v. Crowninshield,* 4 Wheat. 122, 202, are pertinent:

> "Before discussing this argument, it may not be improper to premise that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, *that a case for which the words of an instrument expressly provide, shall be exempted from its operation.*"
>
> *Sturges v. Crowninshield,* 4 Wheat. 122, 202.

See, also:

> *Marbury v. Madison,* 1 Cranch. 137, 175.

So, we find that although a minority of the delegates to the convention did not agree to the principle, the majority intended to prohibit both the national government and the several states from levying any taxes of *any character* upon exports, and used the clearest and most unambiguous language possible to effect that intention. The observations of this court in *Fairbank v. United States, supra,* 181 U. S. 283, 290, are most pertinent:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' *Whether such provision is or is not wise is a question of policy with which the courts have nothing to do.*"
>
> *Fairbank v. United States;* 181 U. S. 283, 290.

II.

Appellee Makes No Direct Answer to Our First Point That the Court Below Erred in Holding That Exportation of the Oil Did Not Commence Until After the "Nucula" Started From the Marine Terminal to New Zealand.

As noted, the appellee does not challenge our statement of facts. It concedes that the parties had contracted for the exportation of the oil from California to New Zealand by delivery by appellant to the R. F. A. "Nucula" and carriage by that vessel to New Zealand. Nor does appellee attempt to answer our contentions, supported by the numerous authorites cited in our opening brief (1) that delivery of the oil to the "Nucula" was a necessary, incidental part of, and step in, its exportation; (2) that exportation of the goods commences with their first movement towards the sea. Neither does appellee directly, or at all, as we read its brief, attempt to sustain the rule upon which the California Supreme Court mainly based its decision, viz.: that exportation of goods does not start until after the vessel into which they have been loaded has cleared for a foreign port. Neither is there any reply to that portion of the decisions of *Blount v. Monroe*, 60 Ga. 61, 65-6, and *Clarke & Co. v. Clarke* (C. C. Ga.), 3 Woods 408, 410-411, Federal Cases No. 2846, pp. 943, 944-5, pointing out that the exception in the export clause permitting the levy of imposts necessary to carry out inspections shows conclusively that it could not have been the intention of the framers of the Constitution that an export did not start until the goods were on board ship. On page 24, these cases are dismissed with the statement that they were prior to the decision of *Brown v. Houston*, 114 U. S. 622, and *Coe v. Errol*, 116 U. S. 517, and

appear contrary to those decisions. We think the factual situation is different, and that there is no conflict between the decisions. In any event, neither *Brown v. Houston* nor *Coe v. Errol* considered the point we are discussing.

Appellee argues:

(1) That the claim of refund conceded, or admitted, that the oil was not exported until the "Nucula" started for New Zealand.

(2) That the delivery of possession of the oil and the passing of title, both within the state, constituted an intrastate or local sale, notwithstanding the fact that such passage of title and delivery of possession was in accordance with the terms of the contract for exportation of the oil and irrevocably committed it to exportation.

We will answer each contention separately.

(1) THE CLAIM OF REFUND DOES NOT CONCEDE OR SHOW THAT EXPORTATION DID NOT START UNTIL THE "NUCULA" CLEARED FOR NEW ZEALAND, OR THAT ANY TAXABLE EVENT OCCURRED PRIOR TO THE EXPORTATION OF THE OIL.

On pages 12-13, appellee says:

> "But in its claim for refund, which Appellant concedes is binding upon it, it stated that the oil was loaded onto the tanker on May 14, 1937, and that it 'was thereafter duly exported on May 15, 1937 from Long Beach, California to Auckland, New Zealand * * *.' [R. p. 13.]"

> "This is an accurate statement of what happened. The oil was exported by the purchaser the day after it was loaded upon its vessel."

This play on words has not been previously suggested by appellee, nor was it considered by either of the courts below. Clearly the word "exported" in the above excerpt was used in the sense of the word "transported."

We do not believe that the excerpted sentence, standing alone and by itself, contains any concession that the oil was not in process of exportation when being delivered to the vessel, or that loading the oil upon the vessel was not a necessary step in exportation. Certainly it is not when read in connection with the entire claim, which is found in the record at pp. 11-15. It sets out the transaction in detail, the invitation by the Control Board in New Zealand for bids "for the supply of a cargo of fuel oil required for the New Zealand Division of the Royal Navy" [R. 12-13]; the acceptance of appellant's bid [R. 13]; the written agreement by appellant to supply fuel oil to the New Zealand Navy, the oil to be delivered at designated price f.o.b. Los Angeles to the order of the Secretary of the Navy at Wellington, N. Z. into New Zealand Naval Tank Steamer R. F. A. "Nucula," and for the issuance of bills of lading and the customary shipping documents consigning the oil to the Naval Officer in Charge, at Auckland, New Zealand [R. 13]. The claim then alleged:

> "Pursuant to such written agreement dated February 4, 1937, the taxpayer on May 14, 1937 *loaded at its Long Beach, California, terminal into the New Zealand Naval tank steamer R. F. A. 'Nucula'* 43,756.85 barrels of fuel oil in bulk to be delivered to the Naval Officer in Charge at the Port of Auckland, New Zealand, as evidenced by copy of Bill of Lading dated May 14, 1937, signed by Geo. Atwood, Master of the R. F. A. 'Nucula' and now in tax-

payer's possession. Such fuel oil was thereafter duly exported on May 15, 1937 from Long Beach, California, to Auckland, New Zealand, as evidenced by United States Customs Service Form 7527, Shipper's Export Declaration, a copy of which the Taxpayer has in its possession." [R. p. 13.]

It will be thus observed that the claim set forth all of the facts which the appellant urged in the court below and here contends constitutes an exportation of the oil, a state tax upon which is forbidden by the Constitution of the United States. If, as we believe, it is the law that goods are in exportation with their first movement towards the sea, and that loading goods upon a vessel is a necessary and essential step in their exportation, the claim, under the rules governing pleadings in this state, was amply sufficient.

In *Kidwell v. Ketler*, 146 Cal. 12, 17-18, 79 Pac. 514, 515-6, the court, in passing upon the construction by the Superior Court of a trust, said:

> "Thus at the threshold of the inquiry as to the true construction of the trust, appellants are met with the objection of the respondent that they are bound, first, by their admissions of the allegations of his complaint, and, second, by the identical affirmative allegation which they have made in their cross-complaint. But, answering the respondent's objection, it is to be noted that both in the complaint and in the cross-complaint, the will of Jacob Beideman is set forth in full, and the deraignment of title is shown in both instances to be from the trust clause of that will. The case presented, therefore, is one where the pleader sets forth his chain of title, and upon that chain pleads ownership. It is uniformly held

that an allegation made under such circumstances is an allegation of a conclusion of law not calling for a denial, and not binding upon either party. * * * And, as is said in Brown v. Newall, 2 Nylne & C., 558, 'Now it is a rule of pleading that although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those. *It is for the court to judge what are those legal consequences.*'"

Kidwell v. Ketler, 146 Cal. 12, 17-18, 79 Pac. 514, 515-6.

See, to the same effect:

Farish v. Coon, 40 Cal. 33, 52-53;

Jorgensen v. Dahlstrom, 53 Cal. App. (2d) 322, 331, 127 P. (2d) 551, 555;

Code of Civ. Proc., sec. 1859;

Dennis v. Roberts (C. C. A. 9), 19 F. (2d) 1, 2.

On page 13 of its brief appellee states that it does not appear whether the oil flowed by gravity through appellant's pipelines or was lifted by winches on to the dock, and that the method of loading would make a difference.

We are unable to comprehend what difference it would make whether the oil was loaded in barrels by winches or flowed through pipe lines. *Either method would move the oil into the carrier vessel,* and either would be an essential step in its exportation. However, appellee is in error in its statement.

It was stipulated that appellant's refinery at Watson was connected with its storage tanks at the Marine Terminal by a pipe line [R. 31]; that when advised that the "Nucula" was twenty-four to forty-eight hours from

the Marine Terminal, appellant started pumping oil from its refinery tanks to its storage tanks [R. 32]; that there are no records available to

> "show whether on either trip the 'Nucula' was ready to receive the oil before the entire cargo had been pumped into the storage tanks, but the oil was not held in the tanks more than twenty-four to thirty-six hours before the plaintiff started pumping it from the storage tanks into the 'Nucula.' After the pumping of said oil from the storage tanks into the 'Nucula' was started, it was continued without interruption until the entire cargo was delivered into the tanks of the 'Nucula'." [R. 32.]

Clearly, under the authorities cited in our opening brief*,—and appellee has cited none to the contrary,—the exportation of the oil started when appellant commenced pumping the oil from its tank farm at Watson to its storage tanks at the Marine Terminal, and it certainly was moving in exportation when it was being pumped from the latter tanks into the "Nucula." In any event, the act of loading it on to the vessel in any manner was *an act incident to, and a necessary part of and step in, its exportation. Otherwise, the contract for its exportation could not have been fulfilled and the oil could not have reached New Zealand.*

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*Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 126;

Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336, 341;

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526-7;

Hughes Bros. v. Minnesota, 272 U. S. 469, 475-6.

Exportation of goods by sea necessarily involves getting them upon the vessel as well as their carriage by the vessel to a foreign country. We submit that if any step in the process of exportation of goods is made taxable under any guise, then the import-export clause will have been completely nullified.

In *United States v. Hvoslef*, 237 U. S. 1, 13, this Court in holding that Clause 5 of Section 9, Article I, prevents the Federal Government from taxing exports and prohibited it from requiring revenue stamps upon charter parties, said:

> "'It was the clear intent of the framers of the Constitution that the process of exporting the products of a State, the goods, chattels, and property of the people of the several states, *should not be obstructed or hindered by any burden of taxation.*'"
>
> *United States v. Hvoslef*, 237 U. S. 1, 13.

Miller, in his work on the *Constitution*, cited with approval in the above decision, says:

> "The prohibition in regard to duties on exports, which, by another clause, is also a limitation upon the power of the Federal Government, makes it very clear that the Constitution intended that no product of a State which was in the process of exportation should be taxed either by a State or by the Federal Government; in other words, *that the process of exporting the products of a State, the goods, chattels, and property of the people of the several States, should not be obstructed or hindered by any burden of taxation imposed by either State or Federal authority.*"
>
> Miller on the Constitution of the United States, pp. 591-2.

(2) Appellee Fails to Distinguish the Case of Spalding & Bros. v. Edwards From the Case at Bar and Cites No Authorities Sustaining its Contention That the Sale Here Taxed Was Not an Export Sale.

While there can be no denial that the delivery of the oil to the "Nucula" (which passed possession and title thereof to the purchaser) was in accordance with the contract for the exportation of the oil to New Zealand and a necessary and incidental part of and step in such exportation, the appellee contends that the passage of title (which it asserts was a mere happenstance (AB p. 13) coupled with change of possession of the oil made the sale a local or intrastate sale subject to tax.

We believe that the acts of the appellant in the case at bar are identical in their legal effect with the acts of the appellant in *Spalding & Bros. v. Edwards*, 262 U. S. 66, 67, where this court held that notwithstanding the fact that both title and possession of the exported goods passed to the vendee within this country, the federal export clause forbade the application to the sale of a federal sales tax. On pages 41 to 46 of our opening brief we argued that the case at bar could not be distinguished from the *Spalding* case and pointed out (B 44-45) that this was the conclusion of the first decision of the court below and was adhered to by the Chief Justice in his dissenting opinion, concurred in by Justice Edmonds.

We are unable to find in appellee's brief any attempt to distinguish the *Spalding* case from the one at bar other than that delivery was there to a common carrier, and appellee's erroneous assertion, heretofore noted, that the

decision would have been the same had the sale been an interstate one.

In support of its contention that the transaction constituted a local sale, appellee cites no case dealing with an export, nor does it attempt to distinguish the principles of the many cases cited in our opening brief that an export starts with the first movement of the goods to the sea*, and that loading goods upon a vessel is a necessary and incidental part of their exportation.**

Appellee cites in support of its contention *Superior Oil Co. v. Mississippi*, 280 U. S. 390; *Department of the Treasury v. Wood Preserving Corporation*, 313 U. S. 62, and *International Harvester Company v. Department of Treasury of Indiana*, 322 U. S. 340.

The last case cited may be dismissed from consideration for the reason the decision was not based upon the fact that the taxed sales were local, but that as shown by the excerpts from that decision quoted in our opening

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**Texas & N. O. R. Co. v. Sabine Tram Co., supra*, 227 U. S. 111, 126;

Railroad Commission of Louisiana v. Texas etc. Co., supra, 229 U. S. 336, 341;

Southern Pacific Terminal Co. v. Interstate Commerce Commission, supra, 219 U. S. 498, 526-7;

Hughes Bros. Timber Company v. Minnesota, supra, 272 U. S. 469, 475-6;

Spalding & Brothers v. Edwards, supra, 262 U. S. 66, 68-9;

Carson Petroleum Co. v. Vial, 279 U. S. 336-7;

Blount, Sheriff, et al. v. Munroe, supra, 60 Ga. 61, 65-66;

Clarke & Co. v. Clarke, supra, 3 Woods 408, 410, Federal Cases No. 2846, pp. 943, 944-5.

***Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92-4.

brief, pages 58-59, there was no constitutional prohibition against a state taxing interstate commerce where such taxes were nondiscriminatory and of such a nature as not to burden that commerce unduly or interfere with congressional control thereof.

The *Wood preserving* case dealt with an interstate transaction and not with an export sale. It was placed upon the ground apparently that the sale there involved was an intra, and not an interstate sale. As we have pointed out, however—and appellee does not and cannot challenge it—the later decisions of this Court; especially *International Harvester Company v. Department of Treasury of Indiana, supra,* show that the real basis of that decision was the same as in *McGoldrick v. Berwind-White Coal Mining Company,* 309 U. S. 33, 46-7, and numerous other decisions cited in the opinion of the court below, viz., that interstate commerce is not immune from taxation which is not discriminatory and which does not unduly burden it or interfere with congressional control thereof.

But, as we have so repeatedly pointed out, we are not dealing with a case of interstate commerce but with an export sale, a state tax upon which is clearly and unequivocally prohibited by the export clause.

The question in *Superior Oil Co. v. Mississippi, supra,* 280 U. S. 390, was whether the taxed sales were intra or interstate. Under the contentions of the appellee and the many decisions cited, the tax there challenged was probably valid whether the transactions were intra or interstate. The decision, however, seems to assume the contrary and is based on the premise that they were intrastate sales.

From the appellee's statement, one might think the factual situation of the instant case quite similar. An examination of Justice Holmes' opinion will show that there is no similarity whatever. In the *Superior Oil* case the appellant sold gasoline to packers at Biloxi in the State of Mississippi and delivered it to the packers' wharves. The contract of purchase did not bind the packers, as did the contract in the instant case, to carry the oil outside the state or to make any use or disposition of it, so that it was both physically and legally possible for the packers to have used or sold it within the State of Mississippi, or to have made any other disposition of it they saw fit. Actually, the packers placed the oil upon their own boats, transported it outside of the state, and sold it to certain shrimp fishermen in Louisiana, although there was no legal or other obligation upon them to do so. It is also true that the oil company in each case received from the purchaser (although the time of such receipt does not clearly appear from the opinion) what was denominated a bill of lading, reading in part: "Consigned to Gussie Fontaine Pkg. Co. Destination: Grants Pass, La." With reference to this document and the claim that it committed the oil to interstate transportation, we quote from the opinion of Justice Holmes:

> "The instrument then provided that 'the property consigned herein remains the property of said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination', with provisions throwing all risks upon the purchasers. The seller of course paid no freight. The document seems to have had no other use then, as the supreme court of Mississippi said, *to try to convert a domestic transaction into one of interstate com-*

merce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. *The document hardly can affect the case,* because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.' "

Superior Oil Co. v. Miss., 280 U. S. 390, 394-5.

In distinguishing the case from *A. G. Spalding & Bros v. Edwards,* 262 U. S. 66, Justice Holmes said:

"But here the gasolene was in the hands of the purchaser to do with as it liked, *and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes.*

* * * * * * * *

"But on the other hand, the desire to make its act an act in commerce among the states was equally unimportant *when it was apparent that the buyer's journey to Louisiana was accidental so far as the appellant was concerned.*"

Superior Oil Co. v. Mississippi, 280 U. S. 390, 395-6.

In the instant case, the transportation of the oil to New Zealand was not accidental, nor was the situation

in any way similar to that of the *Superior Oil Company* case, where it was determined there was nothing that in any way committed the appellant in that case to send the oil out of Mississippi. In the instant case when the "Nucula" received the oil, it was compelled by the contract, by the export declaration, and by the bill of lading consigning the oil to the Naval Officer-in-Charge at Auckland to transport the oil to New Zealand. The delivery of the oil to the "Nucula" was, as we have so often pointed out, a necessary step in its exportation, and to attempt to carve out and segregate a single taxable incident is entirely absurd and comes squarely within the observations of this Court in *Nippert v. City of Richmond* (not yet officially reported), 90 L. Ed. 496, 500, to which appellee has made no reply.

From the time the Control Board first asked for bids for oil for the New Zealand Navy, everything done by the respective parties to the transaction looked towards and was a step in the exportation of the oil to New Zealand. That it was in fact exported is not, and can not, be denied. But, appellee asserts, the State may, nevertheless, levy a sales tax upon the transaction because both title and possession of the oil passed to the purchaser within the confines of this state.

The constitutional inhibitions against state taxation of exports make no exception to transactions wherein title or possession, or both, pass to the exportee within a state, but forbid state taxation of *any export*. In other words, if a transaction constitutes an exportation of goods, the

Constitution clearly forbids any state taxation thereof regardless of whether the goods are carried to the foreign country by the exporter, the exportee, a carrier or a common carrier.

Of course, this does not mean that where a sale is independent of any exportation of the goods and is completed within the state that it may not be taxed by the state because the purchaser thereafter and independent of the sale carries the goods to a foreign country, but it does mean that the state may not tax the sale where either delivery of possession or passage of title to the goods, or both, *is a part of and necessary incident to and a step in their exportation to a foreign country by either vendor or vendee.*

Let us assume that in the interests of the national defense, Congress, prior to this transaction, had enacted a statute under the commerce clause forbidding the exportation of oil, and that the appellant had been indicted for violation of that statute. Would anyone contend that the appellant could defend its actions upon the ground that it had not exported the oil, but had merely made a local sale of it by passing title and possession in California to the purchaser by delivering the oil to the purchaser's vessel sent here pursuant to contract with appellant *for the express purpose of carrying the oil out of California and to a foreign country?*

Appellee strenuously argues (AB 9-11) that any rule which would prohibit a state from taxing an export

sale where the goods were not delivered to a common carrier would work great confusion and injustice, saying on pages 9-10 of its brief:

> "If a tourist buying jewelry were exempt from taxes on purchases which he made while visiting in a State, local residents might claim to be tourists. The same administrative difficulties would be encountered if out-of-state businessmen were free to send their trucks, or railroad cars or ships into the State to take possession of goods purchased from local vendors."

This is substantially the same argument as that used by the court below except that the opinion of the court below assumed that a banjo was sold to a Mexican who declared verbally or by affidavit that he intended to export it.

Of course, nothing is better settled by the decisions of this court, or more firmly grounded in reason, than that the mere intention of a purchaser to export articles which he purchases do not make the sale an export. The rule rests on the soundest logic and consideration of public policy. If it were otherwise, both retailers and the state would be subject to innumerable frauds. For example, if a purchaser in a retail store sought to buy an overcoat, claiming he intended to send it to his son who was overseas, from the very necessity of the case his declaration could not exempt the sale from the sales tax. There would be no way of ascertaining the fact that he carried out his express intention, and there would be no legal

compulsion upon him to do so. Even if his declaration had been honestly made, and not with fraudulent intent of defeating the tax, he could still change his mind or make a local disposition of the garment. On the other hand, if the purchaser pays for the overcoat and contracts that it be shipped by mail or express to his son in a foreign country, under the regulations of the appellee there is no tax upon the sale. Why? It has been consummated wholly within the state, but its consignment to a common carrier has assured its being exported from the state. That is why in the usual and normal course of events the delivery to a common carrier will exempt a sale, where the delivery to the purchaser in the state under such circumstances that he can or cannot export the article will not exempt it. Where, however, the delivery is under such circumstances as disclosed in the case at bar, that the act is necessarily part of the exportation and irrevocably commits the goods to exportation, the constitutional prohibition against the state tax applies.

While appellee asserts (AB 13) that the passing of title did not make the tax applicable, but was "a mere happenstance," it will be observed that the Sales Tax Act of California made the tax applicable upon either delivery of the goods within the state or the passing of title. Appellee does not deny that under the law of this state, as in most jurisdictions, delivery to a common carrier would have passed title to the purchaser. Under its regulatory rule No. 26, no tax would be levied if the goods were delivered within this state to the purchaser's

"broker or forwarding agent for shipment outside this State" (App. AB 51). Such delivery certainly would pass both title and possession.

Indeed, we submit that appellee's Rule 26 is wholly inconsistent with its present position.

"Sales Tax Rule No. 26

Interstate and Foreign Commerce

The California retail sales tax does not apply to gross receipts from sales made in interstate or foreign commerce.

Exempt Transactions"

Three examples are then given where the sale is exempt, the third being:

"(3) delivery by the retailer *to a custom's broker or forwarding agent for shipment outside this State."* (AB p. 51.)

This clearly shows that appellee itself has never considered the passage of title and possession within this state as making the sales tax applicable where the delivery and passage of title are under such conditions as to insure transportation of the goods beyond the state. No reason suggests itself why the "Nucula" was not a forwarding agent within the meaning of the rule. Certainly no reason is apparent why delivery to the "Nucula" was not at least as adequate to carry the goods out of the state as would be delivery to a customer's broker or forwarding agent.

III.

Appellee Advances Neither Reason nor Authority to Sustain the Third Ground of the Majority Decision of the Court Below That the Tax Can Be Sustained as a License Tax for the Privilege of Doing Business Within the State.

Appellee's answer to our third point can be disposed of briefly. Its argument that the tax can be sustained as a privilege tax is predicated upon its theory that the export clause does not prohibit a state from imposing non-discriminatory taxes upon exports or imports.

On pages 16 and 17 appellee says:

> "If goods are taxed *as* exports or *because of* their intended exportation; or if the process of exportation itself is taxed there would be a violation of Article I, Section 10, Clause 2." (Emphasis appellee's.)

We are unable to perceive any practical difference between the right of the state to tax goods in the process of exportation and to tax the privilege of exporting. Certainly, if there is a difference, it is not one of substance.

As shown in our opening brief, in *Brown v. Maryland*, 12 Wheat. 419, 439, 444, Chief Justice Marshall pointed out specifically that all must concede a tax upon the right to sell was, in fact, a tax on the thing sold, that the state had a right to tax local transactions because there was no constitutional prohibition against it, but that it could not tax the privilege of selling imported goods because that was contrary to the Constitution.

In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, this Court in answering the contention that a tax

on the gross receipts from export sales could be sustained as a privilege tax for doing business in the state, said:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts."
>
> *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294.

See, also, to the same effect:

Henderson v. Mayor, 92 U. S. 259, 268;

Galveston etc. Railway Co. v. Texas, 210 U. S. 217, 227;

Kansas City v. Bothin, 240 U. S. 227, 231;

St. Louis etc. Railway Co. v. Arkansas, 235 U. S. 350, 362.

In the last case cited, it is said:

> "Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."
>
> *St. Louis etc. Railway Co. v. Arkansas*, 235 U. S. 350, 362.

Conclusion.

We respectfully but confidently submit that the transaction involved in the instant case was an exportation of oil. That was what the parties contracted for, what they contemplated, and everything they did a necessary and incidental part of and step in its exportation. A tax upon any incident of that export is clearly forbidden by the Federal Constitution, and the judgment of the court below sustaining the tax as not in contravention of the Constitution, we submit, should be reversed.

All of which is respectfully submitted.

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APPENDIX "A."

Madison, Journal of Constitutional Convention (Scott's Ed., 1894), vol. 2, pp. 717-719.

"The clause relating to exports being reconsidered, at the instance of Colonel Mason,—who urged that the restrictions on the States would prevent the incidental duties necessary for the inspection and safe keeping of their produce, and be ruinous to the staple States, as he called the five Southern States,—he moved as follows: 'provided, nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing and indemnifying the losses in keeping the commodities in the care of public officers, before exportation.' In answer to a remark which he anticipated, to-wit, that the States could provide for these expenses, by a tax in some other way, he stated the inconvenience of requiring the planters to pay a tax before the actual delivery for exportation.

Mr. Madison seconded the motion. It would at least be harmless; and might have the good effect of restraining the States to *bona fide* duties for the purpose, as well as of authorizing explicitly such duties; though perhaps the best guard against an abuse of the power of the States on this subject was the right in the General Government to regulate trade between State and State.

Mr. Gouverneur Morris saw no objection to the motion. He did not consider the dollar per hogshead laid on tobacco in Virginia, as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption.

Mr. Dayton was afraid the proviso would enable Pennsylvania to tax New Jersey under the idea of inspection duties of which Pennsylvania would judge.

Mr. Gorham and Mr. Langdon thought there would be no security, if the proviso should be agreed to, for the States exporting through other States, against these oppressions of the latter. How was redress to be obtained, in case duties should be laid beyond the purpose expressed?

Mr. Madison. There will be the same security, as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was, that this was insufficient. A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.

Mr. Fitzsimons. Incidental duties on tobacco and flour never have been, and never can be, considered as duties on exports.

Mr. Dickinson. Nothing will save the States in the situation of New Hampshire, New Jersey, Delaware, &c., from being oppressed by their neighbours, but requiring the assent of Congress to inspection duties. He moved that this assent should accordingly be required.

Mr. Butler seconded the motion.

Adjourned."

Madison, Journal of Constitutional Convention (Scott's Ed., 1894), vol. 2, pp. 717-719.

APPENDIX "B."

Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, pp. 481-483.

"Mr. George Mason. Mr. Chairman, if gentlemen attend to this clause, they will see we cannot make any inspection law but what is subject to the control and revision of Congress. Hence gentlemen who know nothing of the business will make rules concerning it which may be detrimental to our interests. For forty years we have had laid duties on tobacco, to defray the expenses of the inspection, and to raise an incidental revenue for the state. Under this clause, that incidental *revenue* which is calculated to pay for the inspection, and to defray contingent charges, is to be put into the federal treasury. But if any tobacco-house is burnt, we cannot make up the loss. I conceive this to be unjust and unreasonable. When any profit arises from it, it goes into the federal treasury. But when there is any loss or deficiency from damage, it cannot be made up. Congress are to make regulations for our tobacco. Are men, in the states where no tobacco is made, proper judges of this business? They may perhaps judge as well, but surely no better than our own immediate legislature, who are accustomed and familiar with this business. This is one of the most wanton powers of the general government. I would concede any power that was essentially necessary for the interests of the Union; but this, instead of being necessary, will be extremely oppressive.

Mr. George Nicholas. Mr. Chairman, I consider this clause as a good regulation. It will be agreed to that they will impose duties in the most impartial manner, and not throw the burdens on a part of the community. Every man who is acquainted with our laws must know that the duties on tobacco were as high as sixteen shillings a hogshead. The consequence was, that the tobacco-makers have paid upwards of twenty thousand pounds, annually, more than the other citizens; because they paid every other kind of tax, as well as the rest of the community. We have every reason to believe that this clause will prevent injustice and partiality. Tobacco-makers will be benefited by it. But the gentleman says that our tobacco regulations will be subject to the control of Congress, who will be unacquainted with the subject. The clause says that all such laws shall be subject to the revision and control of Congress. What laws are meant by this? It means laws imposing duties on the exports of tobacco. But it does not follow that laws made for the regulation of the inspectoin shall be subject to the revision of Congress. He may say that the laws for imposing duties on the exports of tobacco, and laws regulating the inspection, must be blended in the same acts. Give me leave to say that they need not be so; for the duties on exports might be in one law, and the regulation of the inspection in another. The states may easily make them separately. But, he says, we shall lose the profit. We shall, then, find equity in our legislature which we have not found heretofore; for, as they will lay it not for their own exclusive advantages, but partly for the benefit

of others, they will not be interested in laying it partially. As to the effect of warehouses being burnt, I differ from him. A tax may be laid to make up this loss. Though the amount of the duties go into the federal treasury, yet a tax may be laid for that purpose. Is it not necessary and just, if the inspection law obliges the planter to carry his tobacco to a certain place, that he should receive a compensation for the loss, if it be destroyed? The legislature must defray the expenses and contingent charges by laying a tax for that purpose; for such a tax is not prohibited. The net amounts only go into the federal treasury after paying the expenses. Gentlemen must be pleased with this par., especially those who are tobacco-makers.

Mr. George Mason replied, that the state legislatures could make no law but what would come within the general control given to Congress; and that the regulation of the inspection, and the imposition of duties, must be inseparably blended together.

Mr. Madison. Mr. Chairman, let us take a view of the relative situation of the states. Some states export the produce of other states. Virginia exports the produce of North Carolina; Pennsylvania, that of New Jersey and Delaware; and Rhode Island, that of Connecticut and Massachusetts. The exporting states wished to retain the power of laying duties on exports, to enable them to pay the expenses incurred. The states whose produce is exported by other states were extremely jealous, lest a contribution should be raised of them by the exporting

states, by laying heavy duties on their commodities. If this clause be fully considered, it will be found to be more consistent with justice and equity than any other practicable mode; for, if the states had the exclusive imposition of duties on exports, they might raise a heavy contribution from other states, for their own exclusive emolument. The honorable member who spoke in defence of the clause has fairly represented it. As to the reimbursement of the loss that may be sustained by individuals, a tax may be laid on tobacco, when brought to the warehouses, for that purpose. The sum arising therefrom may be appropriated to it consistently with the clause; for it only says that "the *net* produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States," which necessarily implies that all contingent charges shall have been previously paid."

Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, pp. 481-483.